

Pursuant to Ind.Appellate Rule 65(D),  
this Memorandum Decision shall not be  
regarded as precedent or cited before  
any court except for the purpose of  
establishing the defense of res judicata,  
collateral estoppel, or the law of the  
case.

ATTORNEY FOR APPELLANT:

**STEVEN J. HALBERT**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEPHEN R. CARTER**  
Attorney General of Indiana  
Indianapolis, Indiana

**PAMELA S. MORAN**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

RICHARD FOX,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0604-CR-195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

---

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila Carlisle, Judge  
Cause No. 49G03-0502-FA-014585

---

**APRIL 10, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBERTSON, Senior Judge**

## STATEMENT OF THE CASE

Defendant-Appellant Richard Fox (“Fox”) brings this direct appeal after being found guilty at a bench trial of three counts of Class A felony child molesting and two counts of Class B felony criminal confinement. He received a total executed sentence of 140 years, which includes a habitual offender enhancement. He now appeals.

We affirm.

## ISSUES

Fox states the issues as:

1. Whether Fox’s conversation with the police should have been suppressed where he was not Mirandized at the hospital before this interrogation.
2. Whether Fox was improperly convicted and sentenced for child molestation and confinement where the actual evidence used by the trial court to support the convictions was the same.

## FACTS

On January 27, 2005, a twelve-year-old female, E.D., left home to make a five-minute walk to a nearby grocery store to buy milk. On the way home she was confronted by a black man (later identified as Fox), who was wearing a big heavy coat. He put his arm around her and told her that she would not be hurt if she was good. Fox displayed a small knife and pushed her into a vacant house. He took her to a “dirty room” and told her to remove all of her clothing. Even though it was cold E.D. complied. She was told to lie down and be still. E.D. did as she was told after Fox said “good girls get to go home and don’t tell, and they don’t get hurt”. Tr. 157. Fox pulled his pants down. He then placed his finger inside a container containing a lubricant and rubbed its contents on

E.D.'s "privates". Fox tried to penetrate E.D.'s "privates" but could not, so he penetrated her anus with his penis. Fox told E.D. he would only be ten more minutes. However, the attack continued for a half-hour. Fox kissed E.D. on her neck and cheek as she lay still and frightened. After he was finished, Fox retrieved the lubricant container. E.D. tried to run down the stairs. However, Fox caught E.D. and used his knife to make her go back upstairs. Fox repeated his attack on E.D. When he finished, he left her naked and told her to stay there until he left. When Fox was at the bottom of the stairs he yelled to E.D. and then left the house. E.D. dressed and then ran home.

When E.D. arrived home her brothers were preparing to look for her because she had been gone for a long time. She was screaming, crying, and badly frightened when she told her parents what had happened. The police were called and E.D. gave them a description of her assailant. She was taken to the hospital and examined by a doctor and a certified sexual assault nurse examiner. E.D. was found to have rug burns, abrasions, and scratches to her back and arm. There were abrasions of her vagina, some bruising to her hymen, and an anal tear. E.D. also gave the police a description of Fox and a composite sketch of him was prepared.

Also on January 27, 2005, an eleven-year-old female, C.S., was walking towards school when a man (Fox) attempted to start a conversation with her. C.S. continued walking to school. The next day, Fox approached C.S. as she was walking to catch a bus. Fox approached her from the rear and held a knife close to her neck. Fox threatened to stab her to death if she did not keep her mouth shut. Fox walked her down an alley and then to a house. He reached down her shirt and touched her left breast. He then

unbuttoned and unzipped her pants and looked at the “private part” of her body. Fox then left. C.S. continued to school, reported the incident to school officials, who then called her parents and the police. C.S. provided a description of her attacker, and later identified his picture during a line-up conducted by the police.

Additional facts will be added as needed.

## DISCUSSION AND DECISION

### Issue 1.

When the police captured Fox, he was hiding in a closet and was extracted therefrom by a police dog. He was Mirandized, there was an initial interrogation, and then he was taken to the hospital for treatment of the dog bite. Later, the police resumed their interrogation at the hospital.

We initially note the obfuscation in the record. Fox filed a motion to suppress the purpose of which was to challenge the issuance of a search warrant. That subject received the merest of mention at the hearing on the search warrant. Discussion about the events that started with Fox’s capture and ended with the subsequent recording of his interrogation at the hospital several hours later consumed the bulk of the hearing.

On appeal, Fox argues that the trial court erred when it denied his motion to suppress evidence. However, because Fox did not seek an interlocutory appeal after the denial of his motion to suppress, the issue presented is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. See, Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006). A trial court has broad discretion in ruling on the admissibility of evidence. Id. Accordingly, we will reverse a

trial court's ruling on the admissibility of evidence only when the trial court abused its discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

As expressed in Crain v. State, 736 N.E.2d 1223 (Ind. 2000):

[s]everal standards govern our review. First, the State bears “the burden of proving beyond a reasonable doubt that the defendant voluntarily and intelligently waived his rights, and that the defendant’s confession was voluntarily given”. Second, where that standard has been met, “[t]he decision whether to admit a confession is within the discretion of the trial judge and will not be reversed absent an abuse of that discretion.” And third, when reviewing a challenge to the trial court’s decision to admit a confession, we do not reweigh the evidence but instead examine the record for substantial, probative evidence of voluntariness.

Crain, 736 N.E.2d 1223, 1230 (Ind. 2000). (internal citations omitted.)

The record shows that Fox waived his Miranda rights. Fox was advised by police officers of his rights. Those rights were read to Fox off of a card, one by one, and after each Fox was asked if he understood that specific right. Fox replied in the affirmative to each one and continued answering questions asked by the police.

Fox argues that he should have been Mirandized again when the questioning by police resumed at the hospital where Fox had been taken for treatment of the dog bite. The sequence of events as presented in the record is that the police interrogated Fox when he was arrested. However, the interrogation ceased when the ambulance arrived to take Fox to the hospital. The interrogation resumed at the hospital after Fox had been treated for the dog bite. The entire process from Fox’s capture until the completion of his hospital interrogation lasted for about three hours.

Miranda warnings need not be repeated if the circumstances surrounding the interruption or adjournment of the process have not deprived the suspect of the opportunity to make an informed and intelligent assessment of his interests involved in the interrogation. Willey v. State, 712 N.E.2d 434, 442 (Ind. 1999). The interrogation was interrupted by the arrival of the ambulance to take Fox to the hospital. We fail to see how or why such an interruption deprived Fox of the opportunity to make an informed and intelligent assessment of his interests.

Parenthetically, we note that, although Fox claims that there is no signed documentation stating that he understood or waived his Miranda rights, the record contains Defendant's Exhibit D which explains his rights and contains a waiver of those rights. The Exhibit states that it has been read to Fox, is signed by Fox, and duly witnessed.

The trial court did not abuse its discretion in ruling on the admission of Fox's confession.

#### Issue 2.

Fox makes a double jeopardy argument in this issue alleging that the trial court used the same set of facts to convict him of the felonies of confinement and child molesting.

The State urges waiver under the doctrine of invited error, citing Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005). Even though Fox waives this issue, we are of the opinion that the issue does not present error.

Two or more offenses are the “same offense” in violation of Article I, Section 14 of the Indiana Constitution if, with respect to either the statutory elements or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).

Criminal confinement, as applicable to this appeal and as defined by Ind. Code §35-42-3-3, occurs when a person who knowingly or intentionally removes another person by force or threat of force from one place to another and is a class B felony if it is committed while armed with a deadly weapon. Child molesting, as applicable to this appeal and as defined at I.C. §35-42-4-3, occurs when a person, who, with a child under fourteen years of age, performs sexual intercourse or deviate sexual conduct, and is a class A felony if it is committed by a person at least twenty-one years of age, or if it is committed by using or threatening the use of deadly force or while armed with a deadly weapon.

Two of the class A felonies of child molesting alleged Fox was over twenty-one years of age, and the other class A felony of child molesting charged Fox with using a deadly weapon.

At sentencing the trial court said:

...I, also, recognize the fact that there were two separate victims on two separate days. And I, also recognize that the facts that the Court was presented with clearly show distinct and separate crimes as to each victim. That is, that the confinement had to take place before the defendant could molest. It wasn't something that occurred at the same time. It was clearly the defendant moving these girls to where he wanted to molest them, getting himself to the position and the opportunity to molest them. And

then, after he confined them in that way, taking them to those locations with a knife, he proceeded to molest each one of them.

Tr. 269-70.

A comparison of the statutory language defining the elements of confinement and child molesting shows that the statutes are not the same. A review of the facts as set forth at the beginning of this opinion shows that the actual evidence used to convict is not the same. As the trial judge indicated at sentencing, the use of the knife in the instance of C.S.'s confinement and child molesting, is not duplicitous because the elements of the two offenses are not the same. Double jeopardy did not occur.

#### CONCLUSION

Under the facts of this appeal Fox did not require a second Miranda warning when his interrogation was resumed at the hospital. There is no double jeopardy violation.

Judgment affirmed.

ROBB, J., concurs.

BARNES, J., concurring in part and dissenting in part.

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

RICHARD FOX,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0604-CR-195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

---

**Barnes, J., concurring in part and dissenting in part**

With regard to my colleagues' conclusion that the trial court did not abuse its discretion by admitting Fox's confession, I concur. I further concur with their conclusion that the actual evidence used to convict Fox of child molesting and criminal confinement is not the same and that, as such, there is no double jeopardy violation here that warrants reversing any of Fox's convictions. I would, however, reduce one of Fox's Class B felony criminal confinement convictions to a Class C felony. In that regard, I respectfully dissent.

With regard to the crimes committed against C.S., the State's charging information provides:

#### COUNT IV

Richard Fox, being at least Twenty-one (21) years of age . . . while armed with a deadly weapon that is: a knife, did perform or submit to any fondling or touching with [C.S.], a child who was then under the age of fourteen (14) years . . . with intent to arouse or satisfy the sexual desires of Richard Fox;

\* \* \* \* \*

#### COUNT VII

Richard Fox, on or about January 28, 2005, while armed with a deadly weapon that is: a knife, did knowingly or intentionally remove [C.S.], by force or threat of force, from the 1000 Block of North Kealing to the back yard of 1023 North Ewing [.]

App. pp. 34-35 (emphases added).

Indiana Code Sections 35-42-4-3(b) provide that Class C felony child molesting may be elevated to a Class A felony if: “(1) it is committed by using or threatening the use of deadly force; (2) it is committed while armed with a deadly weapon.”<sup>1</sup> Indiana Code Section 35-42-3-3(b)(2) provides that Class D felony criminal confinement may be elevated to a Class B felony if it: “(A) is committed while armed with a deadly

---

<sup>1</sup> Class B felony child molesting that is committed by acts of sexual intercourse or deviate sexual conduct may be elevated to a Class A felony if the perpetrator is at least twenty-one years of age, but that fact may not be used to elevate child molesting that is committed via fondling or touching. See Ind. Code § 35-42-4-3.

weapon.”<sup>2</sup> This statute does not allow for the elevation of the crime where the perpetrator uses or threatens force.

Fox was found guilty of child molesting and criminal confinement as charged by Counts IV and VII, and the trial court convicted him of the elevated felonies. Based on the State’s allegations, the only way Fox’s convictions could be elevated was by relying on the fact that he confined and molested C.S. while armed with a knife. The trial court erred when it relied on the same fact to elevate both convictions. See Richardson v. State, 717 N.E.2d 32, 56 (Ind. 1999) (Sullivan, J., concurring) (“to the extent that a defendant’s conviction for one crime is enhanced for engaging in particular additional behavior or causing particular additional harm, that behavior or harm cannot also be used as an enhancement of a separate crime”); Guyton v. State, 771 N.E.2d 1141 (Ind. 2002) (adopting Justice Sullivan’s concurrence in Richardson as controlling law) .

I would reduce Fox’s Class B felony conviction for criminal confinement as alleged in Count VII to a Class C felony.

---

<sup>2</sup> This crime may be elevated to a Class C felony when the victim is under fourteen years old. See I.C. §35-42-4-3(b).